A Dysfunctional Eurozenship? The Question of Free Movement

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Dora Kostakopoulou's proposal to disentangle European citizenship from Member States nationalities is legally dysfunctional. Member States never agreed to grant European citizens an absolute right to free movement within the European Union (EU) territory. Thus, in case of a public policy breach, or lack of sufficient resources, citizens can be expelled by their host state to their state of nationality. Accordingly, the whole framework regulating mobility within the Union hinges upon Member States' nationality status – in accordance with Directive 2004/38/EC. Therefore, a European citizenship model autonomous from Member States' nationality cannot work within the context of free movement. Should we end the debate, then, and take Richard Bellamy's side? Not necessarily. Dora Kostakopoulou's Eurozenship can be both improved and approved, and below I offer a few options for doing it.

The first (sensitive) option: full freedom of movement for every European citizen

The first option to make Eurozenship functional is to give citizens unconditional freedom of movement within the EU territory. This would involve removing every limitation, such as sufficient resources or respect for the public policy. In other words, every citizen would have, by design, an absolute right to settle wherever he or she wants, for an indefinite period. Is this feasible? In principle "yes," subject to the need to extend the right of permanent residence to every European citizen (irrespective of the length of residence) and repeal the restrictions related to public policy, public security, and public health. It would require a few amendments to the Directive 2004/38/CE that the Parliament and the Council could carry on. Is this politically achievable in the current state of affairs? Probably not.

Such a move, from limited to absolute freedom of movement, already occurred in other associations of states. In the United States, the Supreme Court ruled that states could restrict freedom of movement, for instance, to avoid "the moral pestilence of paupers, vagabonds, and possibly convicts"[1)]New York v. Miln, 36 U.S. 102 (1837), at 142 (see here). . A century later, in 1941, the Court overturned its judgment, holding that states were no longer able to limit the freedom of movement – "the peoples of the several States must sink or swim together"[2)]Edwards v. California, 314 U.S. 160 (1941), at. 174 (Justice Byrne quotes Cardozzo) (see here). . Similarly, in Switzerland, the Federal Constitution used to give every Canton the right to expel convicted or indigent citizens. Until 1943, the Canton of Geneva was still strongly in favour of such restrictions, fearing to become "a garbage filled with individuals considered undesirable elsewhere"[3)]Septième rapport du Conseil fédéral

sur les mesures propres à assurer la sécurité du pays, BOAF, 1943. II. 164 (see here). . In 1975, however, the Helvetic Confederation abolished all limitations to the freedom of movement by referendum and established thereby in the Constitution that "[E]very Swiss citizen can settle in any place in the country." These two cases illustrate how federal solidarity can (slowly) evolve and progress.

What is the EU situation: Is it reaching a point close to the United States in 1941, or Switzerland in 1975? There is no definitive answer to this question, but some evidence suggests that distance still needs to be covered. Member States are still using deportation measures to remove European citizens. In some cases, deportation policies are widely advertised, such as France's removal of Roma populations, Germany's ban on "social tourism", or Belgium's deportation of Spanish citizens. Below the surface, data shows that thousands of European citizens are quietly expelled by host Member States on economic or public policy grounds every year[4]Directorate-General for Internal Policies, Obstacles to the right of free movement and residence for EU citizens and their families, 2016, PE 571. 375, 158 p. (see here).. It seems relatively easy to consider a European citizen as an ordinary "foreigner" rather than a "fellow-citizen". Hence, a legislative move toward absolute freedom of movement seems rather unlikely.

The second (practicable) option: a "rescue residence" linked to Eurozenship

The second option to make Eurozenship functional is to create a "rescue residence" to determine a Member State responsibility for receiving a European citizen without (European) nationality who would have been expelled by a host Member State. This path is well known to young or weak federations with limited freedom of movement. In the United States, freedom of movement used to operate within a framework set up by "settlement laws". The model came from Elizabethan England and its notorious "poor laws". Citizens were able to claim a right of settlement in a certain state after a given period without using social assistance (the length varied across states, from one to five years)[5]Daniel R. Mandelker, Settlement Requirement in General Assistance, 1955 Wash. U. L. Q. 355 (see here). . Once the settlement was established in a given state, the latter would normally be chosen as a return destination in case of deportation by another state. Likewise, the Confederal and then Imperial Germany recognised a similar principle. The Law of 6 June 1870 provided a two-year delay to acquire a "rescue residence" (*Unterstützungswohnsitz*) in a local community in charge of social assistance and repatriation[6]Gesetz über den Unterstützungswohnsitz, 6 June 1870, BGBl. S. 360. .

Could a similar disposition be built into Dora Kostakopoulou's proposed scheme? Indeed, it could. It is possible to link the autonomous acquisition of European citizenship to the acquisition of a first rescue residence. In other words, residence in a specific state would not only allow individuals to get European citizenship, but also to establish a "rescue residence" in that state. Accordingly, every Member State welcoming foreigners long enough to enable them to obtain European citizenship would be, at the same time, responsible for them – should another Member State want to deport them on economic or public policy grounds. Practically, this would only require amending Directive 2004/38EC by specifying that European citizens

who do not hold the nationality of a Member State could be deported in the State of rescue residence.

To conclude: no (more) reason to oppose an autonomous Eurozenship

The critical question would remain whether to adopt this new kind of European citizenship disentangled from Member State nationalities. Then, this “rescue residence” not only fixes the Eurozenship and the question of free movement, but it helps to take a stand. First, this new category of European citizens would not be some sort of “weightless” citizens; on the contrary, they would have a strong link with an identified Member State through their rescue residence. Hence, this would be one way to eliminate the risk of “the erosion of solidarity within states” that Richard Bellamy rightly raises to oppose Dora Kostakopoulou’s proposal. Second, I consider residency the most appropriate proxy for establishing a person’s belonging. Therefore, I see no reason to oppose Dora Kostakopoulou’s idea that residence or domicile should be “the main criterion for the acquisition of EU citizenship” – even if I would rather choose the ten-year delay of the European Convention on Nationality (art. 6, 3.).

What is next? The federal debate cannot be avoided. Yet, it is no longer taboo to state that the EU is *already* a Federation[7)]Here I rely on Olivier Beaud, *Théorie de la Fédération* (Paris: PUF, 2007).. The adoption of this new kind of citizenship would only lead EU’s federal attributions to deepen, and certainly not to change its very nature. One should also remember that in 1913, the German Empire implemented a new “direct” imperial citizenship (“*unmittelbare Reichsangehörigkeit*”), to be granted by the Chancellor of the Empire, alongside with the old way of access through the federal states’ citizenship (“*Staatsangehörigkeit in einem Bundesstaat*”)[8)]Reichs- und Staatsangehörigkeitsgesetz, 22 July 1913, RGBl. S. 583.. In fact, the broad picture suggests that the terms of this debate are hardly unique in history. The United States, Germany and Switzerland cases (at least) show that sooner or later, the EU will face both the question of autonomous federal citizenship and free movement of citizens. Dora Kostakopoulou’s proposal, packed with a “rescue residence” system, is, I believe, a good compromise. The next move is political, and it would be left to the sovereign discretion of the European people and their representatives – probably not tomorrow, “but it is worth giving a try”[9)]See Dimitris Christopoulos’ contribution..

References

- 1. New York v. Miln, 36 U.S. 102 (1837), at 142 (see here).
- 2. Edwards v. California, 314 U.S. 160 (1941), at. 174 (Justice Byrne quotes Cardozzo) (see here).
- 3. Septième rapport du Conseil fédéral sur les mesures propres à assurer la sécurité du pays, BOAF, 1943. II. 164 (see here).
- 4. Directorate-General for Internal Policies, Obstacles to the right of free movement and residence for EU citizens and their families, 2016, PE 571. 375, 158 p. (see here).

- 5. Daniel R. Mandelker, Settlement Requirement in General Assistance, 1955 Wash. U. L. Q. 355 (see here).
- 6. Gesetz über den Unterstützungswohnsitz, 6 June 1870, BGBl. S. 360.
- 7. Here I rely on Olivier Beaud, Théorie de la Fédération (Paris: PUF, 2007).
- 8. Reichs- und Staatsangehörigkeitsgesetz, 22 July 1913, RGBl. S. 583.
- 9. See Dimitris Christopoulos' contribution.
